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Attorneys for Complainant

DEPARTMENT OF HEALTH

STATE OF HAWAII

DEPARTMENT OF HEALTH, STATE OF  
HAWAII,

Complainant,

vs.

OCEANSIDE 1250 PARTNERS (a.k.a. 1250  
Oceanside Partners),

Respondents.

DOCKET NO. 2000-CW-EO-7

HOKUL'A DEVELOPMENT, KONA

CONSENT ORDER

**CONSENT ORDER**

1.        The DEPARTMENT OF HEALTH, State of Hawaii ("DOH"), and 1250 OCEANSIDE PARTNERS, a Hawaii limited partnership, a.k.a and formerly identified in this docket as Oceanside 1250 Partners, ("Oceanside" or "Respondent") enter into this Consent Order under Hawaii Revised Statutes ("HRS") chapter 342D; and Hawaii Administrative Rules ("HAR") chapter 11-54, entitled "Water Quality Standards" and chapter 11-55, entitled "Water Pollution Control." The intention of this Consent Order is to resolve disputes connected with the

September 9, 2000 and November 2, 2000 runoff of storm water containing soil, dirt, silt, or sediment into the Pacific Ocean at Oceanside's Hokuli'a project in Kona, Hawaii.

**A. PARTIES**

2. The Complainant is the Department of Health, State of Hawaii.
3. The Respondent is 1250 Oceanside Partners, dba Oceanside 1250, a Hawaii limited partnership doing business in Hawaii.
4. The general partner of Oceanside is Red Hill 1250, Inc., a Washington corporation.

**B. AUTHORITY OF THE DOH**

5. HRS §§ 342D-2, 342D-4, 342D-9, 342D-30 and 342D-31, authorize the DOH to take enforcement actions and to assess penalties of up to \$25,000.00 for each day of each violation of HRS chapter 342D, or HAR chapters 11-54 or 11-55.

**C. HISTORY**

6. At all relevant times, Oceanside owned, operated, managed, or controlled, and presently owns, operates, manages, or controls a development located in Kona, Hawaii, west of Kealahakua, Hawaii, known as Hokuli'a ("Hokuli'a" or the "Project").
7. On October 11, 1999, the DOH issued Notice of General Permit Coverage No. HI R10B008 ("NGPC") to Oceanside.
8. The DOH issued to Oceanside a Notice and Finding of Violation ("NFV") and Order dated November 22, 2000, under HRS ch. 342D, and HAR chs. 11-54 and 11-55, alleging violations of HRS § 342D-50, HAR chapters 11-54 and 11-55, and Oceanside's NGPC. The NFV and Order alleged facts and violations which are incorporated here as assertions.
9. On December 11, 2000, Oceanside requested a hearing to contest the NFV and Order.

10. Both before and after issuance of the NFV and Order, Oceanside constructed additional erosion control measures in excess of those specified in the NGPC. The total cost of those additional erosion control measures was \$4,859,890.

11. All coral affected by the September 9 and November 2, 2000 runoff events has fully recovered.

#### **D. OBJECTIVE, PUBLIC INTEREST**

12. The purpose of this Consent Order is to resolve all penalty and other disputes relating to the NFV and Order. The parties desire to settle their disputes without the risks and costs of a contested case hearing, adverse findings and conclusions, or a final order or judgment after litigation.

13. The parties agree that settlement of these matters without further administrative procedure is in the public interest and the execution of this Consent Order is the most appropriate means of resolving these matters.

#### **E. SETTLEMENT**

14. Oceanside shall pay the sum of Fifty Thousand Dollars (\$50,000) to the DOH as part of the full and final settlement of the NFV and Order, along with the payment required by paragraph 16 and implementation of the other duties set by this Consent Order, and not as a penalty and without any admission of liability. Payment shall be governed by paragraph 17. Because this settlement payment is in lieu of penalties that might otherwise be imposed, Oceanside shall not claim any tax deductions, federal, state, local or otherwise, for any payments made under this Part E (SETTLEMENT).

#### **F. ENVIRONMENTALLY BENEFICIAL PROJECT(S)**

15. In addition to the settlement payment to DOH payable under paragraph 14, above, Oceanside shall fund or undertake one or more Environmentally Beneficial Project(s)

(“EBP(s)”), which the Parties agree are intended to secure significant environmental benefits for the island of Hawaii. The EBP(s) shall consist of the project(s) which shall be recommended by Oceanside and selected by the Director of Health. As part of its recommendation, Oceanside shall provide a projected cost and completion date for each proposed EBP, and the Director of Health shall approve EBP(s) with an aggregate projected cost of not more than One Hundred Fifty Thousand Dollars (\$150,000). Oceanside shall propose EBPs within six months after the effective date of this Consent Order, and the Director of Health shall approve proposed EBP’s, and associated completion dates, within 90 days after receipt of Oceanside’s proposal.

16. Oceanside shall fund One Hundred Fifty Thousand Dollars (\$150,000) for expenditure on the EBP(s). If the amount stated in this paragraph, plus any interest accrued on such amount in the account set up under paragraph 17, is not spent for EBP(s) by the dates that may be set to correspond to EBP(s) completion, or any extensions of dates made under Parts I (DELAYS OR IMPEDIMENTS TO COMPLIANCE) or T (MODIFICATIONS), then the Director of Health may order that the balance of the money in the account (including accrued interest) be treated as an additional settlement amount payable under Part E (SETTLEMENT) and be paid under Part H (FORM OF PAYMENT) within seven (7) days of the Director’s order and Oceanside shall have no further obligations under this Consent Order with respect to the completion of any unfinished EBP(s).

#### **SUBPART F-A, FUNDING MECHANISM**

17. Oceanside shall deposit the settlement payment amount referred to in paragraph 14 plus the EBP(s) funding amount referred to in paragraph 16, a total amount of Two Hundred Thousand Dollars (\$200,000), into an escrow account bearing interest on commercially reasonable terms within seven (7) days of Oceanside’s execution of this Consent Order. If, after the public notice and comment period for this Consent Order, DOH notifies Oceanside that DOH

is not withdrawing from this Consent Order, the settlement payment amount referred to in paragraph 14, plus any interest accrued on such settlement payment amount to that time, shall be paid in accordance with Parts H (FORM OF PAYMENT) and L (NOTIFICATION), and after that DOH shall approve when and as needed the expenditure of the remaining funds, plus interest accrued to the time of each expenditure for the purpose of implementing the EBP(s). Payments for EBP(s) may be made directly to contractors or vendors, if appropriate. If, after the public notice and comment period for this Consent Order, DOH notifies Oceanside that DOH is withdrawing from this Consent Order, Oceanside may withdraw all amounts deposited into the escrow account plus accrued interest from the interest bearing account.

#### **G. ALTERNATIVE REMEDIES**

18. The provisions of this Consent Order shall not be construed to limit any other remedies, including but not limited to institution of proceedings for civil or criminal liability, available to the DOH for violations of this Consent Order or of any other provision of law, other than the violations alleged in the NFV and Order referred to in Part C (HISTORY).

#### **H. FORM OF PAYMENT**

19. The settlement amount payable under Part E (SETTLEMENT) shall be paid from the escrow account by cashier's check, made payable to the State of Hawaii, and shall be received at the DOH as set forth in Part L (NOTIFICATION).

#### **I. DELAYS OR IMPEDIMENTS TO COMPLIANCE**

20. If any event occurs or a situation arises which causes or may cause delays in Oceanside's achievement of the EBP(s) required under Part F (ENVIRONMENTALLY BENEFICIAL PROJECT(S)), then after learning of the delay or anticipated delay, Oceanside shall notify the DOH orally promptly and in writing. The notice shall describe in detail the anticipated length of the delay, the cause or causes of the delay, the measures taken and to be

taken by Oceanside to prevent or minimize the delay, and the timetable by which those measures will be implemented. Oceanside shall adopt all reasonable measures to avoid or minimize any such delay. Failure of Oceanside to comply with the notice requirements of this paragraph shall render this Part void and of no effect as to the particular incident involved and shall constitute a waiver of Oceanside's right to request an extension of time to complete its obligations under this Consent Order based on the incident.

21. If the parties agree that the delay or anticipated delay in compliance with this Consent Order has been or will be caused by circumstances beyond the control of Oceanside and that Oceanside is taking appropriate measures to reduce or mitigate the delay, the time for performance hereunder may be extended for a period no longer than the delay resulting from such circumstances. In such event, the parties shall modify this Consent Order in accordance with the provisions of Part T (MODIFICATIONS).

22. The burden of demonstrating that the delay is caused by circumstances beyond the control of Oceanside shall rest with Oceanside. Increased costs associated with the implementation of the actions called for by this Consent Order shall not, in any event, be a basis for changes in this Consent Order or extensions of time under the preceding paragraph. Delay in the achievement of one interim step shall not necessarily justify or excuse delay in achievement of subsequent steps.

#### **J. DISPUTE RESOLUTION**

23. In the event of a dispute between the parties regarding the implementation of this Consent Order, the position of the DOH shall prevail unless Oceanside submits a written request to the Director of Health to resolve the dispute in accordance with the contested case procedures set forth in Hawaii Revised Statutes Chapter 91.

24. In any dispute, the DOH staff shall have an opportunity to present its position and proposal in writing to the Director of Health.

25. In any such dispute, Oceanside shall have the burden of proving by a preponderance of the evidence that it is in compliance with this Consent Order, as it has been or may be modified. If the dispute relates to the selection of EBP(s), Oceanside shall have the burden of proving, again by a preponderance of the evidence, that its proposal appropriately fulfills the terms and conditions of this Consent Order as it has been or may be modified.

26. The Director of Health's authority to hear facts and resolve disputes arising under this Consent Order may be delegated to a hearings officer for a recommended decision.

27. The Director's final decision shall be binding upon the parties, subject to Oceanside's right to judicial review pursuant to Hawaii Revised Statutes Chapter 91.

#### **K. PUBLIC INFORMATION**

28. All information and documents submitted by Oceanside to the DOH under this Consent Order are subject to public inspection and copying unless identified as confidential by Oceanside at the time of submittal. The information and documents so identified will be disclosed only in accordance with the provisions of HRS chapter 92F and § 342D-14.

#### **L. NOTIFICATION**

29. Whenever, under the terms of this Consent Order, a plan, notice, report, or payment is required to be given to the DOH or Oceanside, such plan, notice, report or payment shall be directed to the individuals specified below, at the addresses or telephone numbers given, unless DOH gives written notice to Oceanside, or Oceanside gives written notice to the DOH, that another individual has been designated to receive such communications, or another or additional method of communication is to be used:

a. DOH:

Denis R. Lau  
Chief, Clean Water Branch  
Hawaii State Department of Health  
919 Ala Moana Boulevard, Room 301  
Honolulu, Hawaii 96814  
Telephone: (808) 586-4309  
Telefax: (808) 586-4352

b. Oceanside:

John De Fries  
Chief Executive Officer  
1250 Oceanside Partners  
78-6831 Alii Drive, #K-15  
Kailua-Kona, Hawaii 96740  
Telephone: (808) 324-1500  
Telefax: (808) 324-0171

**M. DUTY TO COMPLY WITH APPLICABLE LAW**

30. This Consent Order in no way affects or relieves Oceanside's or any subsequent owner's responsibility to comply with all applicable state, federal or local law or regulation.

**N. EMERGENCY AUTHORITY**

31. This Consent Order in no way affects the authority of the DOH to respond to an emergency as provided by law.

**O. ACTIONS AGAINST OTHER PARTIES**

32. This Consent Order does not limit or affect the rights of Oceanside or DOH against any third parties.

**P. AUTHORITY OF SIGNATORIES**

33. Each undersigned representative of a party to this Consent Order certifies that he or she has full authority to enter into the terms of this Consent Order and legally to bind the party which he or she represents.



**Q. BINDING EFFECT**

34. The provisions of this Consent Order shall apply to, and be binding upon, the parties to this action and the general partner of 1250 Oceanside Partners, their successors, and assigns. Until such time as Oceanside has fulfilled its obligations hereunder as to EBP(s), Oceanside shall give notice of this Consent Order to any potential successor in interest as the developer of Hokuli'a prior to transfer of ownership to such successor; at the time Oceanside shall submit a copy of such notice to the DOH. Prior to any such transfer of ownership which occurs before Oceanside has fulfilled its obligations hereunder as to EBP(s), Oceanside shall obtain the approval, consent and joinder of the prospective successor developer in the Consent Order including, without limitation, the assumption of any unfulfilled obligations of Oceanside; at the time, Oceanside shall submit a copy of such approval, consent and joinder to the DOH. If, at the time of transfer of ownership, there are no such unfulfilled obligations under the Consent Order as to EBP(s), then no such notice, approval, consent and joinder shall be required. It is understood and agreed, however, that this paragraph 34 shall not apply in any way to Oceanside's sale of lots (whether individually or in bulk) within the Project or to the purchaser of such lots.

35. This Consent Order is not meant to constitute an encumbrance and/or cloud on the title of the Hokuli'a Property.

**R. ENTIRE AGREEMENT**

36. This Consent Order sets forth the entire agreement between the parties with respect to this matter.

**S. EFFECTIVE DATE**

37. This Consent Order shall become effective immediately upon the signature of both parties.

#### **T. MODIFICATIONS**

38. This Consent Order shall not be modified except in writing, signed by both parties.

#### **U. TERMINATION**

39. Oceanside may request termination of this Consent Order upon demonstration to the DOH's satisfaction that Oceanside has complied with all of the terms of this Consent Order. Within twenty (20) days after such a showing by Oceanside, the DOH shall issue a letter to Oceanside certifying satisfactory compliance or completion, which letter shall terminate this Consent Order.

#### **V. COSTS**

40. Each party shall bear its own costs and attorneys' fees.

#### **W. PUBLIC NOTICE AND PUBLIC COMMENT**

41. As required by 40 C.F.R. §123.27(d)(2)(iii), notice of this Consent Order shall be published in the following publication(s):

The Honolulu Advertiser or Honolulu Star-Bulletin or Midweek; and  
West Hawaii Today.

The public comment period shall run for 30 days from the last date of publication. This notice shall be in the form of Exhibit A attached hereto. DOH shall respond in writing to written public comments.

42. Notice of the proposed EBP(s) shall also be published in the following publication(s):

The Honolulu Advertiser or Honolulu Star-Bulletin or Midweek; and  
West Hawaii Today.

The DOH shall specify the content of the notice.

43. Oceanside shall arrange and pay for publication of the notices contemplated above and shall provide affidavits of publication.

44. The DOH reserves the right, in its sole discretion, to withdraw from this Consent Order within 10 days after the end of the public comment period if comments received during the public comment period indicate that this Consent Order is inappropriate, improper or inadequate. DOH also reserves the right, after withdrawing its consent, to attempt to renegotiate the settlement, to proceed to hearing, or take other action that DOH deems appropriate. In any such event, this Consent Order shall not be admissible in any further hearing on this matter and is subject to Rule 408 of the Hawaii Rules of Evidence. Within 10 days after the end of the public comment period, the DOH shall notify Oceanside of whether DOH withdraws its consent to this settlement.

#### **X. COUNTERPARTS**

45. This Consent Order may be signed by the parties and their attorneys in one or more separate counterparts, each of which shall be deemed an original, but all of which when taken together shall constitute but one and the same Consent Order. The counterparts may be made into one document by omitting duplicate pages. Fax signatures on this document shall be respected as originals.

**AA. EFFECT**

46. This Consent Order constitutes the final order in this case, replacing the Notice and Finding of Violation and Order dated November 22, 2000.

DATED: Honolulu, Hawaii, \_\_\_\_\_.

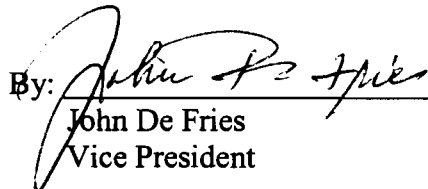
STATE OF HAWAII  
DEPARTMENT OF HEALTH

By: \_\_\_\_\_  
Laurence K. Lau  
Deputy Director for  
Environmental Health

DATED: Kailua-Kona, Hawaii, April 18, 2006.


1250 OCEANSIDE PARTNERS, a Hawaii limited  
partnership

By: Red Hill 1250, Inc., its General Partner

By:  \_\_\_\_\_  
John De Fries  
Vice President

APPROVED AS TO FORM:

\_\_\_\_\_  
Deputy Attorney General

 \_\_\_\_\_  
Attorney for 1250 Oceanside Partners

[NOTE: Attach notarization of signature form w/ authority of General partner to bind partnership, or all general partners sign.]

STATE OF HAWAII  
COUNTY OF HAWAII

)  
) ss.  
)

On this 18<sup>th</sup> day of April, 2006, before me personally appeared **JOHN DE FRIES**, proved to me on the basis of satisfactory evidence, who, being by me duly sworn or affirmed, did say that he is the **VICE PRESIDENT** of **RED HILL 1250, INC.**, general partner of **1250 OCEANSIDE PARTNERS** and that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

BARBARA E. NEVILLE  
NOTARY PUBLIC, STATE OF HAWAII  
COMMISSION EXPIRES: 11/28/2007

*Barbara E. Neville* *SS.*

Name: \_\_\_\_\_

Notary Public, State of Hawaii

My commission expires: \_\_\_\_\_

## **EXHIBIT A**

### **PUBLIC NOTICE**

#### **Water Pollution Case Settlement**

The Department of Health, State of Hawaii ("Department") announces a proposed settlement between Department and 1250 Oceanside Partners ("Oceanside"). On November 22, 2000, Department issued a Notice and Finding of Violation ("NFV") and Order alleging that Oceanside discharged sediment to the ocean at south of Keauhou Bay, Kona in violation of its permit and violated water quality standards. A Consent Order has been drafted to settle this case. Within 30 days of this notice anyone may submit written comments on the proposed settlement to: Mr. Denis Lau, State Department of Health, Environmental Management Division, P.O. Box 3378, Honolulu, Hawaii 96801. The NFV and Order and proposed Consent Order may be reviewed or copied at the Department's Clean Water Branch, 919 Ala Moana Boulevard, Room 301, Honolulu, Hawaii 96814, and at [www.state.hi.us/health/oceanside.html](http://www.state.hi.us/health/oceanside.html). For more information, call Mr. Denis Lau at 586-4309.

## **ENVIRONMENTALLY BENEFICIAL PROJECT AGREEMENT**

The Department of Health ("DOH") and 1250 Oceanside Partners ("Oceanside") agree that the Environmentally Beneficial Project ("EBP") required in Part E (ENVIRONMENTALLY BENEFICIAL PROJECT(S)) of the Consent Order in Docket No. 2000-CW-EO-7, dated \_\_\_\_\_, 2006, (the "Consent Order") will consist of the design and construction of repairs to the loading docks at the launch ramps at Keahou Boat Harbor on the Island of Hawaii (the "Work"). The Work is to be accomplished in the following three phases and for a total cost of not more than \$150,000:

The first phase will consist of engineering activities, including, structural analysis, underwater engineering survey, and plan development. The budget is a range between \$10,000 and \$25,000 depending on the results of the analysis and survey. The approximate time period for completion of engineering activities is three months following issuance of a notice to proceed.

The second phase will consist of permitting activities, including, applications, government coordination, and meetings. The budget is a range between \$5,000 and \$15,000 depending on the level of effort required. The approximate time period for completion of permitting activities is three months following completion of engineering activities.

The third phase will consist of construction activities, including a new walkway and repair of erosion damage on the makai dock, new surface on the mauka dock, a new fendering system for both docks, and other repair work as determined by engineering analysis and funding limitations. The budget is a range between \$110,000 and \$135,000 depending on the amount of funds remaining after completion of the first and second phases. The approximate time period for completion of construction activities is three months following final permit approval.

Oceanside will contract directly with Sea Engineering, Inc. (the "Contractor") for the performance of the Work. DOH agrees that payment for the Work shall be made directly to the Contractor from the escrow account established pursuant to paragraph 17 of the Consent Order without further approval by DOH.

DATED: Honolulu, Hawaii, \_\_\_\_\_.

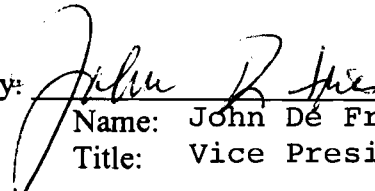
STATE OF HAWAII  
DEPARTMENT OF HEALTH

By: \_\_\_\_\_  
Laurence K. Lau  
Deputy Director for  
Environmental Health

DATED: Kailua-Kona, Hawaii, April 18, 2006.

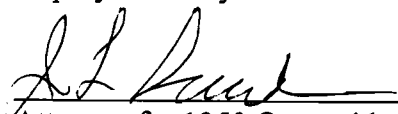
1250 OCEANSIDE PARTNERS, a Hawaii limited  
partnership

By: Red Hill 1250, Inc., its General Partner

By:  \_\_\_\_\_  
Name: John De Fries  
Title: Vice President

APPROVED AS TO FORM:

\_\_\_\_\_  
Deputy Attorney General

 \_\_\_\_\_  
Attorney for 1250 Oceanside Partners